No. 18253

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PETER LEROY ORTIZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

On March 28, 1962, the Grand Jury for the Southern District of California returned an Indictment in four counts charging the appellant Peter Leroy Ortiz and his codefendants Thomas Hernandez Gomez and Trinidad Cortez with violations of the narcotics laws of the United States as proscribed in Title 21, United States Code, Section 174. [C. T. 2-5.][1] The appellant and his co-defendants were arraigned in the court of the Honorable William Byrne on April 9, 1962, and all entered pleas of not guilty on April 16, 1962. The case was then transferred to the calendar of the Honorable Thurmond Clarke. [C. T. 6, 7.] On May 25, 1962, the defendants Gomez and Cortez entered pleas of

[1]C. T. refers to Clerk's Transcript of Record.

guilty prior to trial and Peter Leroy Ortiz was tried by the court on that date. The court found the appellant Ortiz not guilty as charged in Count One and guilty as charged in Count Two of the indictment. [C. T. 14.] On June 27, 1962, the court sentenced the appellant Peter Leroy Ortiz to the custody of the Attorney General for a period of five years. [C. T. 18.]

The jurisdiction of the United States District Court is premised on Section 3231 of Title 18, United States Code. The appellant filed a timely notice of appeal on June 27, 1962, pursuant to Rule 39 of the Federal Rules of Criminal Procedure. The jurisdiction of the Court of Appeals to entertain this matter is set forth in Title 28, United States Code, Sections 1291 and 1294.

II.

STATEMENT OF THE FACTS.

In the morning hours of February 28, 1962, Deputy Sheriff Martin Renteria of the Narcotic Detail, Los Angeles Sheriff's Office, accompanied an informant named Felix to the residence of Trinidad Cortez. The deputy was acting in an undercover capacity. Miss Cortez was home and the informant introduced the officer as Carlos. [R. T. 11, 12.][2] In introducing Carlos, Felix described him as the man who was the source of the $80 which Felix had given to Cortez for the purchase of a quarter ounce of heroin. Felix then indicated that, as Cortez well knew, neither Felix nor Carlos had received the narcotics and they were therefore there to obtain satisfaction, either in the form of the heroin ordered or a return of the money. [R. T. 13.] Cortez re-

[2]R. T. refers to Reporter's Transcript of Proceedings.

plied that she was uncertain as to whether she could obtain the money or heroin but if Carlos would return at seven o'clock that evening she would be more definite. [R. T. 15.]

The officer and informant returned to the Cortez residence that evening. [R. T. 15.] Cortez then joined them and they went to a cafe known as Tony Loya's. [R. T. 16.] At the cafe Cortez entered a public telephone booth adjacent to the dance floor; there she placed a telephone call. [R. T. 16.] The officer was unable to ascertain the number dialed but he did overhear Cortez' conversation. She said: "Hello. Is this Leroy? Yes. I have — I can get $75. Do you have anything? O.K. I will call you back tomorrow at one o'clock. Good-bye." [R. T. 16.]

After exiting the booth, Cortez joined the two men and stated that she had spoken with a man named Leroy and that he had said he could obtain a quarter ounce of heroin for Cortez. She stated that she was to call Leroy the next afternoon at one o'clock in order that the specifics of delivery might be arranged. The two men then escorted her back to her home. [R. T. 17.]

At one o'clock the following afternoon, the Deputy Sheriff returned to the Cortez residence. He was unaccompanied. [R. T. 17, 18.] Cortez greeted him with the statement that Leroy had been to her apartment that morning to effect a delivery of the heroin but, finding that she had no money, he had parted with the instruction that she was to call him in the early afternoon. [R. T. 18.] Miss Cortez did not have a phone in her residence, and since it was afternoon, she

and Renteria proceeded to a public phone booth on a street near her home. [R. T. 18, 19.] At this time the deputy saw Cortez dial the number CApitol 1-1212 and heard her state: "Hello. Who is this? Norma — listen; is Leroy there? Where is he? O.K. We will park our car in front of your house. O.K., we are leaving now." [R. T. 20, 21.] The number dialed was that of the defendant Ortiz. [R. T. 71.] The wife of the defendant Ortiz is named Norma. [R. T. 40.]

The two then drove in the deputy's car to 1268 Isabella Street, Los Angeles, California. [R. T. 21, 40.] In the course of their drive Cortez stated to the officer that they were on their way to Peter Leroy's home and Norma had requested her to park down the street from the house. [R. T. 22.] The deputy parked his car as instructed. They were there a short time when they observed the arrival of an automobile. When Cortez noted that one of the two males that left the car was Ortiz, she exited the deputy's vehicle and joined Ortiz, another male identified as Tommy, a female and two small children. The group then entered the building at 1268 Isabella Street. This structure was described at trial as a multiple unit dwelling with two units adjacent to one another on the street level and one unit below these two. The 1268 address is one of the apartments fronting on Isabella Street. [R. T. 40, 41.] Minutes later Cortez left the apartment and returned to Renteria's car. [R. T. 23.] She told the deputy that: "Leroy's got the stuff. He wants the money." Renteria indicated that he was a bit leary of this arrangement and suggested to Cortez that if Leroy was to make the sale, he would first have to produce the narcotics. Cortez

then left the car and re-entered the Ortiz home. After a short time she appeared at the door of the residence and again walked to Renteria's automobile. At that time she approached the driver's side of Renteria's vehicle and handed him the heroin [Ex. 1D] which is the subject of this prosecution, stating: "Well, O.K., here it is. I got it. Give me $75. Count it out." [R. T. 24.] Renteria then gave her the money and she returned to the house. Shortly thereafter, she returned to the deputy's car and they drove away. It was at this time that she stated: "Well, Leroy didn't know . . . Well, he really didn't want to meet you, but maybe the next time; why I'll introduce him to you." [R. T. 25, 26.]

The surveilling officers noted the appellant Peter Leroy Ortiz open the front door to his apartment, walk onto the porch and appear to observe the Renteria vehicle as it pulled away from the curb. [R. T. 42.]

In the conversation as the deputy drove the woman home, Cortez asked for some narcotics for her use. The deputy declined and asked her who gave her the narcotics; to this, she replied: "Leroy did." [R. T. 26, 27.]

On March 12, 1962, the defendant Ortiz was taken into custody by officers of the Federal Bureau of Narcotics and the Los Angeles Sheriff's office. He was escorted to the Hall of Justice Annex in Los Angeles; there he was advised of his right to remain silent and asked whether he desired to make a statement. [R. T. 62, 63.] The defendant Ortiz then voluntarily gave a statement to the officers admitting his complicity in the sale of the heroin on March 1, 1962. [R. T. 64.]

III.

ARGUMENT.

A. The Testimony of Deputy Sheriff Renteria Relative to His Conversations With Co-Defendant Trinidad Cortez on February 28 and March 1, of 1962 Was Not Violative of the Hearsay Rule.

The appellant has expressed a blanket hearsay objection to all conversations between Officer Renteria and Miss Cortez. It is the position of the Government that each of the conversations in question was properly admitted in that the conversations related were either not hearsay or they were hearsay but receivable as an admission against interests. A conversation representative of each ground of admissibility is discussed below.

Deputy Renteria first related a conversation of February 28, 1962, between himself, an informant named Felix and Miss Cortez at the Cortez apartment. He stated that he was introduced by the informant as Carlos, a party who had advanced $80 to the informant so that the informant might purchase narcotics from Cortez. The Deputy stated that he told Cortez that he wanted the narcotics or the return of the money. Cortez then stated that she did not know if she could obtain the narcotics or money; she requested the deputy to return that evening.

Though this conversation took place out of the presence of the appellant Ortiz, it does not constitute hearsay inasmuch as it is not offered for the truth of the matter asserted, namely, that Carlos through the informant had engaged in prior negotiations for the

purchase of narcotics from the defendant Cortez. This conversation was merely introductory and offered to show the context within which the parties were acting. This principle of evidence has recently received expression in this Circuit. In *Busby v. United States* (9th Cir. 1961), 296 F. 2d 328 the Court states at page 332:

> "It is well established that hearsay evidence is that evidence of out of court assertions by third persons which is admitted to prove the truth of the matter asserted. While it is clear that the testimony . . . concerned out of court assertions . . . it is equally clear that his testimony was not admitted to prove the truth of the matter asserted. . . ."

The Court then held that the testimonial evidence in question was admissible.

The next conversation in question, representative of the second ground of admissibility, took place on February 28, 1962. The officer testified that he overheard a telephone conversation which Miss Cortez engaged in at a public telephone booth. The officer then related that during the course of this call the defendant Cortez asked if she was speaking to Leroy and then said that she could obtain $75 and inquired as to whether the party had anything, which in context referred to heroin. She then stated that she would call back the next afternoon.

A relation of this conversation was hearsay but subject to an exception to the rule provided by representative admissions. McCormick (1954), Handbook of the Law of Evidence, Section 244. It is a fundamental

principle of the law of evidence that "when any number of persons associate themselves together in prosecution of a common plan or enterprise, lawful or unlawful, from the very act of associating there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them."

> *Hitchman Coal & Coke Co. v. Mitchell* (1917), 245 U. S. 229, 249, 38 S. Ct. 65, 71, 62 L. Ed. 260.

This principle has been recognized by this Court in *Williams v. United States* (9th Cir. 1961), 289 F. 2d 599 and *Fuentes v. United States* (9th Cir. 1960), 283 F. 2d 537.

The appellant questions whether there was enough evidence at this stage of the proceedings to prove the existence of a conspiracy or common scheme and plan. The answer is that there need not be enough evidence at this point. Counsel is not so limited in establishing the existence of a conspiracy or common scheme and plan. The existence of such a concert of action does not often take shape in the form of a single act or statement; rather, many acts and statements normally point to the factual and legal conclusion of the existence of a conspiracy. It is because the proof takes this progression that courts must exercise their discretion to allow the admission of evidence subject to "connecting up", *i.e.,* if the otherwise objectionable testimony does not become admissible by the evidence later adduced as clarification and explanation, the court orders

the original testimony stricken. As stated above, this procedure is within the sound discretion of the trial court and has been approved in this Circuit in the case of *Parente v. United States* (9th Cir. 1957), 249 F. 2d 752, 753. See also *United States v. Sansone* (2d Cir. 1956), 231 F. 2d 887 and *Wigmore on Evidence* (1940), 3d Ed., Sec. 1079(a).

The Government did prove the existence of a conspiracy or common plan to violate the narcotics laws of the United States. The evidence in question therefore was admissible. In determining whether a conspiracy or plan was proven the facts must be viewed in the light most favorable to the Government.

Glasser v. United States (1942), 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680;

Williams v. United States (9th Cir. 1961), 290 F. 2d 451;

Robinson v. United States (9th Cir. 1959), 262 F. 2d 645.

In viewing the facts which were before the trial court it should be kept in mind that the actions of Cortez were apparently uninhibited as she was unaware that Deputy Renteria was a law enforcement officer. Those facts indicative of a criminal conspiracy or plan are: (1) following Renteria's conversation with the defendant Cortez relative to the purchase of narcotics, he overheard a telephone conversation of Cortez in which she asked if she was speaking to Leroy and then asked if the party on the other end of the line had heroin. (2) Defendant Cortez then stated to Renteria that she had conversed with Leroy and would call him again the next afternoon to see

if he had been able to obtain a quarter ounce of heroin. (3) On March 1, 1962, Cortez stated that Leroy called at her apartment in the morning and, upon learning that she did not have the money with her, requested her to call at one o'clock that afternoon regarding the purchase of narcotics. (4) Renteria was present at one o'clock that afternoon when Cortez dialed the number CApitol 1-1212. Renteria overheard Cortez ask for Leroy. He then overheard Cortez tell an individual by the name of Norma that they would park down the street from the house. The phone number at the Ortiz residence was CApitol 1-1212. The wife of the defendant Ortiz is named Norma. (5) The Deputy then drove the defendant Cortez to Peter Leroy Ortiz' home at 1268 Isabella Street. On the way Cortez said that Norma had instructed her to park down the street from the house. (6) Renteria parked his car near the Isabella Street address, and saw Peter Leroy Ortiz arrive in a car. Defendant Cortez then exited Renteria's car, joined appellant Ortiz and entered Ortiz's home with him. (7) Cortez returned minutes later and stated: "Leroy has got the stuff. He wants the money." Renteria then stated that he would not make payment until he had received the narcotics; whereupon Cortez left and returned to Ortiz's home. (8) The defendant Cortez returned to the car with the narcotics and requested payment from Renteria. (9) While driving away from the Ortiz residence Cortez stated "Leroy didn't want to meet you." (10) In response to the deputy's question as to her source, Cortez replied that it was Leroy. (11) The appellant Ortiz confessed the sale of narcotics here in question to Federal Bureau of Narcotics Agent Francis Briggs and other law enforcement officers.

The appellant takes the alternative tack that, if the court accepts the proof of conspiracy, it was in error inasmuch as the Government failed to allege a conspiracy. (Ap. B. pp. 5, 16.)[3] This is not a correct statement of the law. In *Fuentes v. United States, supra,* the Court of Appeals for the Ninth Circuit said at page 539:

> "On this appeal the appellant concedes that the admissions and statements of a co-defendant may be admissible as against the other defendant in the absence of a conspiracy count in the indictment if there is sufficient independent evidence of a concert of action between the defendants to sustain the jury's verdict of guilt. Such is the law. Lutwak v. United States, 344 U. S. 604, 73 S. Ct. 81, 97 L. Ed. 593; United States v. Olweiss, 138 F. 2d 798 at page 800, wherein the court stated:
>
> > 'the notion that the competency of the declarations of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admission does not depend upon the indictment, but is merely an incidence of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against the principal.' "

With the above in mind it is apparent that the second conversation is admissible against Ortiz as an admission, a recognized exception to the hearsay rule.

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[3]Ap. B. refers to the Appellant's Brief.

See Wigmore on Evidence (1940), 3d Ed., Secs. 1078, 1079. The Government bases the admission of all subsequent conversations upon the rationale above cited in support of the second conversation.

B. The Court Did Not Err in Admitting the Confession of the Appellant.

The evidence revealed that when Mr. Ortiz was taken into custody he was apprized of the fact that the officers possessed a warrant for his arrest and that he was charged with violating the Federal Narcotic Laws. He was then informed that the law did not require him to make any statement to the officers and that if he chose to do so, the statements could be used against him in a court of law. [R. T. 58.]

Subsequently appellant was taken to the Hall of Justice Annex and there the officers explained the charges pending against him and the penalty provision provided by the statute violated. In the course of conversation, the record does not indicate with exactitude the sequence, the appellant gave the officers a full confession. [R. T. 64.] Mr. Ortiz was then asked whether he was interested in cooperating with the Government by acting in the capacity of an informant. He indicated a willingness to act in this capacity and he was therefore released on a bail of $1,000 in order that he might perform this governmental service.

When brought to trial the appellant did not repudiate the making of the statement; rather, he stated that it was not the truth as it was involuntarily given. Over objection the court held the confession to be voluntary. The question now arises as to whether the admission of this confession was error. Judge Learned

Hand stated in the case of *United States v. Gottfried* (2d Cir. 1948), 165 F. 2d 360, 367:

> ". . . Whether a confession is voluntary depends upon the facts that surround it, and the judge's decision is final as to its competence except in those cases . . . in which his finding of fact is plainly untenable."

In discussing this situation in the Ninth Circuit, this Court has stated in *La Moore v. United States* (9th Cir. 1950), 180 F. 2d 49 at 54:

> "In determining whether a confession . . . is voluntary or involuntary, the trial court 'is necessarily vested with a very large discretion, which will not be disturbed on appeal, unless a clear abuse thereof is shown.' Mangum v. United States (9th Cir.), 289 Fed. 213."

In light of the facts adduced at trial, the authority cited above and *Glasser v. United States, supra,* wherein it was stated that upon appeal the evidence must be viewed in light most favorable to the Government, it is the contention of the United States that the court did not abuse its authority in accepting the confession in question.

Alternatively, the appellant contends that his confession was invalidated in that he was experiencing withdrawal symptoms at the time of his questioning and that this was evidenced by a bloody nose, cramps and his sinking to his knees on the floor during the interrogation. [R. T. 68, 73.] Such assertions were categorically denied by the officers who were present. [R. T. 77, 98.] This matter is disposed of under the authority of the *Glasser* case, *supra.*

As an adjunct of the preceding argument, Ortiz states that his confession is vitiated by the fact that he was under the influence of narcotics at the time he made the statement. This question has received treatment in Wigmore on Evidence (1940), 3d Ed. Sec. 841(2) as supplemented in 1962. He states:

> "A confession made while . . . under the influence of narcotics is governed by the general principle of testimonial capacity, and is therefore usually held admissible . . ."

In discussing testimonial capacity, Wigmore, *supra,* Sec. 499, states:

> "[T]he question is, . . . whether the witness was so bereft of his power of observation, recollection, or narration, that he is thoroughly untrustworthy as a witness on the subject at hand."

It is true that Government's witness, Officer Velasquez, indicated that the subject evidenced some symptoms of being under the influence of a narcotic drug. [R. T. 80.] However, there is no categorical statement that he was under the influence and the matter is a question for the judge as the trier of fact. But assuming, *arguendo,* that the appellant was under the influence of a narcotic drug, the question then becomes whether his ability to comprehend questions asked of him was impaired and whether he was coherent. The uncontradicted testimony of the expert was that the defendant appeared coherent in that he followed the questions asked of him and answered in an intelligible manner. [R. T. 82.]

IV.
CONCLUSION.

On the facts in this record and the law applicable thereto, and for the reasons stated herein, the judgment entered against appellant Peter Leroy Ortiz is free from error and should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM D. KELLER